

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.5 Exceptions to the “Hearsay Rule” Commonly Relied Upon in Child Protective Proceedings

D. Statements of Existing Mental, Emotional, or Physical Condition

Insert the following case summary on page 264, immediately before subsection (E):

A declarant’s out-of-court statements of memory or belief when the statements are offered to prove the fact remembered or believed are specifically excluded from the hearsay exception described in MRE 803(3). *People v Moorer*, ___ Mich App ___, ___ (2004). In *Moorer*, the defendant argued against the admission of testimony from witnesses who claimed that the victim told them that he “had a confrontation with defendant; that defendant wanted to kill [the victim]; that defendant had threatened to kill [the victim]; that defendant said he had a bullet for [the victim]; and that defendant was looking for [the victim] with a gun.” *Moorer, supra* at ___.

The Court of Appeals determined that the trial court had improperly admitted several witnesses’ testimony about the victim’s out-of-court statements because the statements went beyond MRE 803(3)’s exception for statements concerning a declarant’s “then existing mental, emotional, or physical condition.” *Moorer, supra* at ___. The Court concluded that the challenged testimony was inadmissible hearsay because it involved the *defendant’s* past or presumed future actions rather than describing the *declarant-victim’s* intentions or plans. *Moorer, supra* at ___.

CHAPTER 11

Common Evidentiary Issues in Child Protective Proceedings

11.5 Exceptions to the “Hearsay Rule” Commonly Relied Upon in Child Protective Proceedings

I. Residual Exceptions to the “Hearsay Rule”

Insert the following case summary on page 275 before the summary of *People v Lee*, 243 Mich App 163 (2000):

♦ *People v Geno*, ___ Mich App ___, ___-___ (2004):

Defendant was convicted of first-degree criminal sexual conduct for sexually penetrating the defendant’s girlfriend’s two-year-old daughter. During an assessment and interview at a children’s assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child’s pull-up. The interviewer asked the child if she “had an owie,” and the child answered, “yes, Dale [defendant] hurts me here” and pointed to her vaginal area. The defendant argued that the child’s statement was improperly admitted under MRE 803(24). The Court of Appeals held that it was not error to admit the child’s statement because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the four requirements outlined in *People v Katt*, 468 Mich 272 (2003).

The defendant also argued that pursuant to *Crawford v Washington*, 541 US ___ (2004), the defendant’s right to confrontation was violated by the admission of the victim’s statements. The Court of Appeals stated:

“We recognize that with respect to ‘testimonial evidence,’ *Crawford* has overruled the holding of *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), permitting introduction of an unavailable witness’s statement – despite the defendant’s inability to confront the declarant – if the statement bears adequate indicia of reliability, i.e., it falls within a ‘firmly rooted hearsay exception’ or it bears ‘particularized guarantees of trustworthiness.’ *Roberts*, *supra* at 66. However, we conclude that the child’s statement did not constitute testimonial evidence under *Crawford*, and therefore was not barred by the Confrontation Clause. . . .

“Therefore, we conclude, at least with respect to nontestimonial evidence such as the child’s statement in this case, that the reliability factors of *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000), are an appropriate means of determining

admissibility. . . . We therefore conclude that defendant has failed to establish plain, outcome-determinative error with respect to his Confrontation Clause claim.”